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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

ARTHUR D. STUBBS
CAPTAIN, UNITED STATES ARMY,

PETITIONER,

v.

THE UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER fundamental precepts of fair trial through due process mandate disqualification of all prosecuting attorneys from a particular prosecutor's office when an attorney, who had an attorney-client relationship with an accused, joins that office during the prosecution of the accused on criminal charges that were the subject of that attorney-client relationship.

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ARTHUR D. STUBBS
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PETITIONER,

v.

THE UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Arthur D. Stubbs, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW[1]

The opinion and order of the Court of Military Appeals are reported at 23 M.J. 188 (1987) and ____ M.J. ____ (C.M.A. 1987), respectively (Appendix A and B). The opinions of the Army Court of Military Review are unpublished, CM 443721 (A.C.M.R. 25 April 1985) (Appendix C) and CM 443722 (A.C.M.R. 28 March 1985) (Appendix D).

JURISDICTION

The judgments of the Court of Military Appeals were entered on January 12, 1987 and May 6, 1987 affirming petitioner's convictions dated November 20, 1982 and Novem-

[1] Petitioner successfully moved for severance of various charges at trial. Appeal was also taken as to the conviction on the severed charges. The issue considered by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was identical in both cases.

ber 16, 1982, respectively. Petitioner's timely motion for reconsideration of the January 12, 1987 judgment, was denied by the Court of Military Appeals on May 5, 1987. ____ M.J. ___ (C.M.A. 1987) (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner was convicted at Fort Bragg, North Carolina, by two courts-martial composed of officers. The charges of which petitioner was convicted included larceny[2] and violation of a lawful general regulation.[3] He was sentenced by both courts-martial to a dismissal from the service and forfeiture of all pay and allowance. Petitioner was also sentenced to six months confinement by the first court-martial.

At a pretrial session,[4] prior to severance of the charges, petitioner moved that members of the Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, be disqualified from prosecuting his cases. Petitioner argued that he and Captain Judith Robb, an attorney assigned to the legal assistance branch of the Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, had previously entered an attorney-client relationship concerning an adverse administrative action contemplated by the command on the same matters from which the instant charges arose.[5]

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[2] Uniform Code of Military Justice article 121, 10 U.S.C. § 921 (1982) [hereinafter cited as U.C.M.J.].

[3] U.C.M.J. art. 92.

[4] U.C.M.J. art. 39(a), 10 U.S.C. § 839(a) (1982).

[5] The staff of a typical Army Office of the Staff Judge Advocate is divided into various branches such as administrative law, claims, legal assistance

The attorney-client relationship between petitioner and Captain Robb was established on December 8, 1981 and terminated in April 1982 when petitioner was served the charges in this case (R. 185, 192). The prosecutor assigned to try the case conceded that an attorney-client relationship had existed between Captain Robb and petitioner and that confidences concerning the matters giving rise to the instant charges were revealed by petitioner to Captain Robb (R. 184). On August 2, 1982, Captain Robb was assigned duties as a prosecutor in the Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg (R. 192). Captain Robb testified as to the nature and extent of the attorney-client relationship (R. 185-192).

The trial judge denied petitioner's motion finding that Captain Robb had not engaged in any discussions with the prosecution staff regarding her representation of petitioner.[6]

The Army Court of Military Review and United States Court of Military Appeals affirmed the findings and sentences of both courts-martial.

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and military justice or criminal law. Attorneys are transferred from one branch to another by the staff judge advocate as he deems appropriate. Attorneys assigned to the Army Trial Defense Service to represent criminal accuseds are not subject to the control of the staff judge advocate but may, by agreement between the staff judge advocate and the Trial Defense Service supervisory chain, be transferred to the Office of the Staff Judge Advocate.

[6] MJ: I think we can safely say that ordinarily the counsel discuss their cases with each other from a professional, one would imagine, from time to time even from a recreational or gossiping point of view, but in any way professional discussions take place with some regularity between counsel. However, in this case no such discussions have taken place between Captain Robb and any of the prosecutors assigned to this office pertaining to this case. Is that fair? I'm reading between the lines. Is that agreed? All of that?

TC: Yes, your honor.

MJ: Mr. Byrd?

CDC: Your honor, I have no information to indicate that that is not absolutely correct. (R. 193).

The issue litigated before and considered by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction was:

> WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S PREJUDICE BY FAILING TO GRANT HIS MOTION FOR RECUSAL OF THE PROSECUTOR'S OFFICE.

REASONS FOR GRANTING THE WRIT

This case presents a due process issue which has not been, but should be, addressed by the Court. The *ad hoc* approach adopted by the Court of Military Appeals in resolving this case and as the rule of law for future military cases is consistent with that adopted by the one circuit court of appeals that has dealt with the issue in the criminal arena. This approach is inconsistent however, with the rule of vicarious disqualification adopted by the majority of the remaining courts of appeals in the civil arena. This disparity of treatment between the civil litigant and criminal accused in resolving the same issue presents a "real and embarrassing"[7] conflict of opinion requiring the exercise of this Court's supervisory power. Settlement of the principles involved relating to the avoidance of prosecutorial misconduct or the appearance thereof through vicarious disqualification, to insure a fair trial through due process, is of importance to the public at large.

I. CONSTITUTIONAL MANDATES OF FAIR TRIAL THROUGH DUE PROCESS VEST IN THE CRIMINAL ACCUSED A GREATER RIGHT TO DEMAND GUARANTEES OF ETHICAL CONDUCT THAN THAT OF EITHER CIVIL LITIGANTS OR THE COURTS IN THE REGULATION OF ATTORNEY CONDUCT IN CIVIL MATTERS.

The pivotal issue is whether the stringent restriction of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980) [hereinafter DR 5-105(D)][8] must be ap-

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[7] Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

[8] "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

plied when the instant issue arises in a criminal prosecution, not as a matter of regulation of the Bar, but in order to protect the criminal accused's right to a fair trial through due process. The extent to which a party in a judicial proceeding may invoke DR 5-105(D) to prevent the use of confidences imparted to his former attorney against him when the former attorney joins forces with the opponent, now depends on whether the party is a civil litigant or a criminal accused. While the civil litigant enjoys a *per se* application of the rule of vicarious disqualification, the criminal accused, who is subject to the loss of life or liberty, may face his former attorney as a witness for the prosecution.

In the instant case, the government properly conceded before the Court of Military Appeals that petitioner's former attorney, Captain Robb, would have been disqualified from prosecuting appellant in view of the "nexus between her discussions with (petitioner) and the charges in this case."[9] In view of this disqualification, the Court of Military Appeals considered "whether Captain Robb's disqualification as prosecutor in this case required recusal of her colleagues on the prosecution staff."[10] In resolving the issue against petitioner, the Court of Military Appeals rejected the concept of vicarious disqualification or the *per se* approach and adopted an *ad hoc* approach in the interest of "efficient administration of justice."[11] The court held that a military accused may prevail on the issue if, after showing an attorney-client relationship with a member of the prosecutor's staff on the same or related matters to those being tried at his court-martial, the government fails to affirmatively demonstrate that no communication whatsoever occurred between the accused's former attorney and the prosecution staff regarding any aspect of the accused's case.[12]

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[9] United States v. Stubbs, 23 M.J. 188, 192 (C.M.A. 1987); *See also* United States v. Green, 5 C.M.A. 610, 18 C.M.R. 234 (1955); United States v. Stringer, 4 C.M.A. 494, 16 C.M.R. 68 (1954); United States v. Diaz, 9 M.J. 691 (N.C.M.R. 1980); United States v. Fowler, 6 M.J. 501 (A.F.C.M.R. 1978); Manual for Courts-Martial, United States, 1969 (Revised edition), para. 6a.

[10] United States v. Stubbs, 23 M.J. at 192.

[11] *Id.* at 193.

[12] *Id.* at 194.

In establishing this rule for the military, the Court of Military Appeals relies on the decision of the 6th Circuit Court of Appeals in *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 454 U.S. 1149 (1982), wherein that court reversed the ruling of the district court disqualifying an entire Office of the United States Attorney in a criminal prosecution based on ABA Comm. on Professional Ethics and Professional Responsibility, Formal Op. 342 (1975) [hereinafter ABA Formal Opinion 342]. The 6th Circuit's reliance on ABA Formal Opinion 342 in the context of a criminal prosecution is in error, ergo the Court of Military Appeals' reliance on *Caggiano* is also misplaced.

ABA Formal Opinion 342 was not prepared in response to this issue. Careful reading of ABA Formal Opinion 342 reveals that its sole purpose is to insure that DR 5-105(D) is not applied in such a way as to prevent a government agency from performing its function and to insure that government agencies can hire competent attorneys. ABA Formal Opinion 342 clearly does not consider criminal prosecutions, and makes only passing reference to the prosecutor's higher purpose of seeking justice in support of the argument that government attorneys are not subject to the same pecuniary interests as are civilian attorneys.

The inappropriate application of ABA Formal Opinion 342, in the context of a criminal prosecution, creates the dilemma of which petitioner complains. The majority of the circuit courts of appeals, which have passed on the application of DR 5-105(D) in the context of purely civil litigation where no governmental agency is involved, agree that vicarious disqualification is the rule.[13] For the vicarious disqualification

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[13] American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Laskey Bros. of W.Va. v. Warner Bros. Pictures, 224 F.2d 824 (2nd Cir. 1955); W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821 (D.Conn.), *aff'd per curiam*, 302 F.2d 268 (2nd Cir. 1962); Silver Chrysler Plymouth v. Chrysler Motors Corp., 370 F.Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2nd Cir. 1975); Trone v. Smith, 621 F.2d 994 (9th Cir. 1980); Schloetter v. Railoc of Indiana, Inc. 546 F.2d 706 (7th Cir. 1976); Cheng v. GAF Corp., 631 F.2d 1052 (2nd Cir. 1980). *Cf.* Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977).

rule of DR 5-105(D) to be invoked, the former client need show no more than that the matters involved in the present suit, in which the client's former attorney is a member of the firm representing the adversary, are substantially related to the matters involved in the prior attorney-client relationship. The fact that confidences were disclosed during the relationship may be presumed.[14]

Once this threshold requirement is met by the civil litigant, knowledge of confidences of the former client is imputed to all members of the firm with which the former attorney is associated and vicarious disqualification applies. Therefore, had petitioner been a civil litigant rather than a criminal accused, the government's concession that an attorney-client relationship existed would have met the threshold requirement. Confidences to Captain Robb would have been imputed to other members of the prosecution staff, and vicarious disqualification of that staff would have applied. A number of jurisdictions have reached a similar result in criminal prosecutions.[15]

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[14] The court may not inquire into the nature of the confidences alleged.

> To require proof of access to privileged information would "put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion all together." (Citation omitted).

Cheng v. GAF Corp. 631 F.2d at 1056.

[15] Blair v. Armontrout, 626 F.Supp. 512 (W.D. Mo. 1985); United States v. Catalanotto, 468 F.Supp. 503 (D. Ariz. 1978); Love v. Superior Court of Sacramento County, 168 Cal. Rptr. 577 (Ct. App. 1980); People v. Rhodes, 12 Cal.3d 180, 524 P.2d 363 (Cal. 1974); State v. Latigue, 502 P.2d 1340 (Ariz. 1982); People v. Shinkle, 415 N.E.2d 909 (N.Y. 1980); People v. Stevens, 642 P.2d 39 (Colo. App. 1981); State v. Cooper, 409 N.E.2d 1070 (Ohio Com. Pl. 1980); Younger v. Superior Court, 77 Cal.App.3d 892, 144 Cal. Rptr. 34 (Ct. App. 1978); State v. Chambers. 524 P.2d 999 (N.M.Ct.App. 1974); State v. Croka, 646 S.W.2d 389 (Mo. App. 1983); Banton v. State, 475 N.E.2d 1160 (Ind. App. 1985). *But see*, Young v. State, 465 A.2d 1149 (Md. 1983) and cases cited therein. *See also*, Annotation, *Disqualification of Prosecuting Attorney on Account of Relationship with Accused*, 31 A.L.R.3d 953 (1970).

The widely divergent approaches to application of vicarious disqualification in the civil arena, and application of that rule in the criminal arena creates the impression that the interests of regulation of attorney conduct and protection of the basically pecuniary interests of civil litigants are greater than the interests of protecting a criminal accused's right to a fair trial. The 6th Circuit's rejection of a *per se* rule of disqualification in *Caggiano*, 660 F.2d 184 and the Court of Military Appeals rejection of such a rule in the instant case, cannot be justified by assertions that disqualification of an entire prosecutor's office is administratively inconvenient, or by reliance on the considerations set forth in ABA Formal Opinion 342. The criminal accused's right to a fair trial must be paramount.

II. SOCIETAL INTERESTS IN INSURING FAIR CRIMINAL PROSECUTIONS MANDATE THAT EVEN THE APPEARANCE OF IMPROPRIETY MUST NOT ARISE ON THE PART OF GOVERNMENT LAWYERS IN THE PROSECUTION OF A CRIMINAL MATTER, AND SUCH INTERESTS SUBSTANTIALLY OUTWEIGH ANY ADMINISTRATIVE INCONVENIENCE TO THE GOVERNMENT IN INSURING THAT SUCH AN APPEARANCE DOES NOT ARISE.

By adopting the *ad hoc* rule announced in the instant case, the Court of Military Appeals rejects the notion that MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 9 (1980)[16] is a sufficient basis for a strict application of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) in the context of a criminal prosecution. This position is arguably supportable in the context of civil litigation when the issue relates to disqualification of a governmental agency.[17] However, it is not supportable in a criminal prosecution.

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[16] A lawyer should avoid the appearance of impropriety.

[17] ABA Comm. on Professional Ethics and Professional Responsibility, Formal Op. 342 (1975).

Although a prosecuting attorney does not have a pecuniary interest directly tied to his success or that of other attorneys of the prosecutor's staff, considerations such as prestige or reputation, future employment opportunities, favorable evaluations, and advancement are factors that influence a prosecutor's conduct. Further, in a small prosecutor's office such as that in the instant case, the prosecutor who actually conducts the trial of an accused will presumably be highly cognizant of any matters bearing on the case. Any reactions or responses of the accused's former attorney, who is now on the prosecutor's staff, during the normal intercourse between members of that staff, may signal the astute prosecutor of inconsistencies, weaknesses or tactics in his or the accused's case, even though there may be no specific discussions of the case.[18] Finally, the rule adopted by the Court of Military Appeals in the instant case invites and encourages violation of what has long been thought to be the most inviolable privilege–the attorney-client privilege. Whether, as here, the burden is placed on the government to show no communication occurred between the accused's former attorney and the prosecution staff, or the accused is required to show the contrary, the former attorney will be called as a witness to testify contrary to the interests of the accused.

The appearance of impropriety or evil visited on the criminal justice system by adoption of an *ad hoc* approach of resolving the issue is two-fold. First, the accused's attorney switches sides, joining forces with the government. Then, the accused's relationship with his former attorney is violated by attempts to show that there were or were not communications between the accused's former attorney and the prosecutor's staff.[19] The appearance of impropriety thus created, cannot be justified or mitigated by the need to avoid any administrative burden associated with obtaining a prosecutor untainted by association with the accused's former attorney. In fact, the public

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[18] This evil or the appearance thereof could have been avoided simply in this case by transfer of the prosecution to one of the other two commands located on Fort Bragg with a separate Office of the Staff Judge Advocate and prosecution staff.

[19] People v. Shinkle, 415 N.E.2d at 910.

prosecutor should, in fulfilling his paramount duty of seeking justice,[20] insure that his conduct and that of his staff neither infringes on the accused's rights nor brings into question the integrity of the criminal justice system.

[20] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980). *C.f. Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) (Unlike civil litigants, State interest in prevailing at trial "is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.")

CONCLUSION

This case involves fundamental guarantees of fair trial through due process. In order to preserve the criminal accused's right to a fair trial, to maintain the integrity of the criminal justice system and to insure continued public trust and confidence in that system, a rule of vicarious disqualification must be applied in criminal prosecutions. The rule adopted by the Court below is to the contrary, further emphasizing the embarrassing divergence of approaches adopted by the courts of appeals which accord to the civil litigant a greater protection against attorney misconduct or the appearance thereof, than is afforded the criminal accused. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 52435.
CM 443721.

UNITED STATES, APPELLEE,

v.

ARTHUR D. STUBBS, CAPTAIN U.S ARMY, APPELLANT.

Jan. 12, 1987

For Appellant: *Captain Pamela G. Montgomery* (argued); *Colonel Brooks B. La Grua, Lieutenant Colonel Paul J. Luedtke, Captain Bernard P. Ingold, Captain Annamary Sullivan* (on brief); *Lieutenant Colonel William P. Heaston* and *Captain Harry L. Williams, Jr.*

For Appellee: Major Robert L. Swann (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Larry D. Williams* (on brief); *Lieutenant Colonel Gary F. Roberson* and *Major Patrick M. Flachs.*

Opinion of the Court

EVERETT, Chief Judge:

Captain Stubbs was tried by general court-martial during October and November 1982; and, pursuant to his negotiated pleas, he was convicted of six specifications of larceny of percodan tablets in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921.[1] Thereafter, court members sentenced him to a dismissal from the service, 6

[1] Appellant was charged with other offenses as well. However, defense counsel successfully moved for a severance of those charges, so only these six specifications are the subject of this appeal. Appellant's appeal from his subsequent conviction on other charges also has been granted by this Court. *See United States v. Stubbs*, 21 M.J. 275 (No. 52,436) (1985).

months' confinement, and total forfeitures. The convening authority approved these results, and the Court of Military Review affirmed in an unpublished Memorandum Opinion.

In this Court, appellant renews his complaint – originally made at trial and pursued throughout his appeal – that the military judge committed prejudicial error by failing to grant his motion to recuse the entire prosecution staff of the Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg. 21 M.J. 275.

I

Prior to trial, appellant's civilian defense counsel filed several written motions for dismissal or appropriate relief, which were addressed at Article 39(a)[2] sessions before trial on the merits began. One of these, at issue in this appeal, was a motion asking for recusal of all trial counsel assigned to the staff judge advocate's office at XVIII Airborne Corps and Fort Bragg. The basis for the motion concerned one of the judge advocates then assigned to that office, Captain Judith Robb.

The trial brief filed by defense counsel in support of his motion asserts that, from November 1981 and extending into early 1982, Stubbs sought legal advice from Captain Robb, who then was a legal assistance attorney in the staff judge advocate's office. This contact blossomed into an attorney-client relationship; and it concerned the subject matter which later gave rise to the instant charges. Captain Robb represented Stubbs during this time period in an effort to resolve problems administratively. During her representation, Captain Robb heard "through the legal grapevine" that charges on those matters were pending; and she "discussed them at that time and at later times at length with Cpt. Stubbs." In fact, when the charges and specifications actually were preferred, Stubbs prepared a request for Captain Robb to be made available as his individual defense counsel. For some reason, however, it never was submitted. Defense counsel's brief further indicates that, on August 2, 1982,

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[2] Uniform Code of Military Justice, 10 U.S.C. § 839(a).

Captain Robb was reassigned within the staff judge advocate's office to be a trial counsel; and, as part of her duties, she was "assigned to share Headquarters Command jurisdiction with the present prosecutor, Cpt. Mike Hoadley."

In response, trial counsel--Captain Hoadley--also filed a written brief. Therein, he conceded that Captain Robb had "formed an attorney-client relationship with the accused CPT Stubbs in November of 1981" in her capacity "as a legal assistance" officer for XVIII Airborne Corps and Fort Bragg. He also acknowledged that, when Captain Robb was transferred on August 2, 1982, to the Criminal Law Section of the staff judge advocate's office to serve as trial counsel, she was "assigned," *inter alia*, "as an assistant [to himself] for Headquarters Command."

According to Captain Hoadley's brief, on July 23, 1982--prior to Captain Robb's transfer--Captain Hoadley had been "assigned full responsibility for the present case, *United States v. Stubbs* . . . due to the permanent change of station of the former trial counsel, CPT Campbell." Notwithstanding Captain Robb's assignment as his assistant on August 2, Hoadley asserted that "CPT Robb has in no manner whatsoever been involved in the prosecution of any of the charges against the accused, CPT Stubbs. CPT Robb terminated the attorney-client relationship prior to being assigned to the Criminal Law Section."

When litigation of this motion began, civilian defense counsel indicated that apparently he and trial counsel were "awfully close but we're not totally in agreement on the facts." Therefore, he asked to call Captain Robb to testify on the motion. While waiting for her to appear, the military judge referred to the facts recited in the two trial briefs and asked, "Now what's in dispute between the two things, the two sides?" Civilian defense counsel responded, "Your Honor, what's in dispute is the extent to which these, the facts giving rise to these charges and specifications were discussed with Captain Robb" by the accused. After some discussion between the military judge and trial counsel, the military judge asked the prosecutor, "So, as part of that [attorney-client] relationship and under its cloak, so to speak, you are agreed

that the accused made disclosures to Captain Robb about the matters to which these present charges pertain." Trial counsel responded: "Yes, your honor. The only thing that would be in dispute is the extent of that disclosure."

At this point, Captain Robb arrived in the courtroom and was called to testify on the motion. Captain Robb indicated that Stubbs had first come to her concerning a proposed "letter of reprimand" about a "prescription writing incident." At that time she had no idea that the matter would develop into court-martial charges. She continued that, later, "there was some rumblings from the higher-ups in his chain of command, that all of a sudden this would no longer be administrative. However, I was flabbergasted when it actually turned out to become criminal." When she first heard the rumblings, Captain Robb indicated that she did discuss the subject matter of those rumblings to some extent with Stubbs, during which she "offer[ed] him, I think, more consolation than advice at that time." However, Captain Robb left no doubt through her testimony that Stubbs had discussed with her in some detail the conduct which later served as a the basis of the court-martial charges. She indicated that in those discussions Stubbs had steadfastly insisted that the "charges . . . were completely unfounded and he was totally innocent." Concerning one of the specifications, however, Captain Robb and Stubbs even discussed possible motives for one of the complainants to have made her allegations and discussed who might have convinced her to do so.

After Captain Robb had been excused, the military judge turned to counsel, and the following exchange occurred:

> MJ: Okay, aside from what Captain Robb has told us, she–we know that during this period, 8 December until a few days after the 26th of April, this attorney/client relationship in general existed between herself and the accused, which had had as its basic focus some administrative matters which are not directly related to these charges. As a matter of fact, we know what that was; basically, it was about the prescription writing on the 22d of May which was the subject

of the letter of reprimand that we've heard about in the case; and then, shortly after the charges were preferred, the attorney/client relationship was clearly terminated and [on] 2 August Captain Robb became a trial counsel in the Corps SJA office. She was assigned responsibilities for MEDDAC and the Airborne Board and also was assigned to assist Captain Hoadley for Headquarters Command and the 525th MI Group. As a matter of fact, Captain Hoadley, beginning on the 23d of July, had full responsibility for this case. Captain Robb has made no disclosures to anyone about what her former client had said to her and has not been involved in any manner in the prosecution of the case against this accused. That's what I glean from what I've heard so far by way of testimony and the factual recitations from the two motions. Is there any party that disagrees with any of that?

CDC: I don't disagree with that, your honor.

TC: The government doesn't disagree.

Then, the military judge indicated that "[i]t might be useful to get into the equation something about what is this, this institution, the 'Prosecutors Branch of the Office of the SJA of XVIII Airborne Corps.' " After it was established that it consisted of four prosecutors headed by a field-grade officer acting as the Chief of Military Justice, the military judge submitted:

MJ: All right. These prosecutors are assigned responsibilities for advising and representing the government in connection with the cases arising in the various subordinate jurisdictions of XVIII Airborne Corps. Examples have been noted in the previous recitation. The offices, physical offices, are located on one floor, a portion of one floor, of the building occupied by the SJA and joining offices accessible by one single hallway. I think we can safely say that ordinarily the counsel discuss their cases with each other from a professional,

one would imagine, from time to time even from a recreational or gossiping point of view, but in any way professional discussions take place with some regularity between counsel. However, in this case no such discussions have taken place between Captain Robb and any of the prosecutors assigned to this office pertaining to this case. Is that fair? I'm reading between the lines. Is that agreed? All of that?

TC: Yes, your honor.

MJ: Mr. Byrd?

CDC: Your honor, I have no information to indicate that that is not absolutely correct.

MJ: Okay. Well, we'll take that as a fact then.
(Defense counsel nodded his head.)

MJ: I see Captain Mosakowski [detailed defense counsel] would agree.

DC: Yes, sir.

Indicating to civilian defense counsel that "you have the burden, Mr. Byrd," the military judge gave each side an opportunity to argue on the motion, and each relied on their respective briefs. Thereupon, the military judge ruled:

MJ: Well's it's clear that there was no, no actual impropriety here. But for the fact that there was nothing to disclose, there would have, however, been an appearance of impropriety in having Captain Robb working for Captain Hoadley and have them working together with responsibility for one of the jurisdictions. However, since to my satisfaction based on the evidence it's been established that there was no communication by the accused to Captain Robb about any matter of any substance whatsoever concerning these charges, no appearance of impropriety can arise. That being the case, I'm constrained to deny the motion, though I certainly don't commend the practice willy-nilly, mixing up people who are in the position that Captain Robb was with people who may be called upon to prosecute former

clients of their associates. To put it another way, if there had been anything of communication from which an impropriety could have arisen, I would have granted the motion. Because there wasn't, the motion is perforce denied.

II

Before this Court, appellant correctly points out that "the government concedes . . . [that] Captain Robb was disqualified from prosecuting the appellant in view of the nexus between her discussions with the appellant and the charges in this case." In fact, appellate government counsel acknowledges: "The Government agrees that had Captain Robb been assigned to prosecute appellant, she would have been disqualified from so doing. There was, at best, a [']logical nexus' between the conversations she had with appellant and with the charges he faced." The issue then becomes whether Captain Robb's disqualification as prosecutor in this case required recusal of her colleagues on the prosecution staff.

Initially, appellant relies on an interpretative interplay between two elements of the American Bar Association's Model Code of Professional Responsibility. Canon 9 of the Model Code admonishes, "A lawyer should avoid even the appearance of professional impropriety." More specifically, Disciplinary Rule 5-105(D) instructs, "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

However, as was recognized in *United States v. Caggiano*, 660 F.2d 184, 190-91 (6th Cir. 1981), *cert. denied*, 454 U.S. 1149, 102 S.Ct. 1015, 71 L.Ed.2d 303 (1982):

> There is, of course, quite a difference in the relationship between law partners and associates in private law firms and lawyers representing the government. The ABA Committee on Professional Ethics recognized there are

substantial reasons against treating the government as a private enterprise in its Formal Opinion 342, 62 A.B.A.J. 517 (1976). The Committee discussed the situation similar to this case where a lawyer leaves a private practice for government service. The Committee ruled that other government lawyers in the office are not disqualified from handling matters in which their new associate was involved in his former practice. The Committee stated:

When the disciplinary rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates the government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. The important difference in the adversary posture of the government lawyers is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rule through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules.

The Committee concluded that when the individual attorney is separated from any participation on matters

> affecting his former client, "vicarious disqualification of a government department is not necessary or wise."

Whether or not one agrees entirely with the rationale of the American Bar Association's Formal Opinion, clearly it rebuffs appellant's view that Disciplinary Rule 5-105(D) disqualifies all government attorneys who are associated with an individual who is disqualified to participate in a case.

Appellant is correct, however, that a number of jurisdictions which have considered the situation presented in this case have adopted the approach he now commends to us. *See, e.g., People v. Shinkle*, 51 N.Y.2d 417, 434 N.Y.S.2d 918, 415 N.E.2d 909 (1980); *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972); *People v. Stevens*, 642 P.2d 39 (Colo. App. 1981). He also recognizes, though, that other jurisdictions have rejected it in favor of an ad hoc approach. *See, e.g., State v. Fitzpatrick*, 464 So.2d 1185 (Fla. 1985) and cases cited therein at 1187; *United States v. Caggiano, supra.*

We agree with the latter approach. Generally, a per se approach is not desirable from the viewpoint of efficient administration of justice; and it is usually unnecessary. Lawyers and judges, being human, make errors – but not all those errors warrant remedial action. Congress demonstrated its general inclination away from the per se approach when it prescribed in Article 59(a), UCMJ, 10 U.S.C. § 859(a), that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

This Court recognizes that there are unusual instances in which, under compelling circumstances, remedial action is appropriate without regard to an affirmative showing of prejudice. While not detracting in any way from the seriousness with which we view the circumstances of this case, we believe that this is not an instance in which such a reaction is appropriate. We are as concerned as appellant that the appearance of evil be avoided in the administration of military justice. Nonetheless, where it clearly and affirmatively appears that the accused has not been prejudiced by a particular error, there can be no appearance of evil. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986).

Arguing against appellant's suggested approach, the Government has urged this Court, instead, to require appellant to show that he was prejudiced before he is entitled to some relief. In our view, this approach is not workable: While an accused certainly knows what was said between him and his lawyer and, so, can readily produce evidence thereon, he usually will have no idea what was said or done by that lawyer after the lawyer joins the prosecutor's office.

These considerations lead us to set a standard similar to that which we followed in related circumstances in *United States v. Gardner*, 22 M.J. 28 (C.M.A. 1986). There, assistant trial counsel had been inextricably involved in obtaining the immunized testimony of Gardner, prior to his court-martial, for use in the trial of a co-accused. Recognizing the necessity of safe-guarding an accused's fifth-amendment privilege against self-incrimination and recognizing, at the same time, the important role which immunized testimony serves in the administration of justice, we quoted the standard adopted by the Supreme Court for such situations in *Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972):

> "Once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related to the . . . prosecution, the . . . authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." [*Murphy v. Waterfront Comm'n.*,] 378 U.S. [52] at 79 n. 18, 84 S.Ct. [1594] at 1609 n. 18 [12 L.Ed.2d 678 (1964)].

This burden of proof, which we reaffirm as appropriate, is not limited to a negative of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

United States v. Gardner, supra at 30.

According, we hold that, once the accused shows that he entered into an attorney-client relationship with a particular lawyer concerning the same or related matters to those being

tried at his court-martial and that this lawyer, after terminating the relationship, has joined the prosecutor's office then prosecuting the accused, the Government has the burden of affirmatively demonstrating that no communication whatsoever has occurred between that lawyer and the prosecution staff regarding any aspect of the accused's case. Nothing short of the Government's carrying this burden can ensure that the accused suffered no prejudice resulting from knowledge of the confidences of his earlier relationship with his lawyer. The attorney-client relationship, as well as the need to preserve the unquestioned integrity of the court-martial process, is too sensitive to permit anything less.

III

There is no question from our reading of the record that appellant has carried his initial burden. First, Captain Robb left no doubt that she and appellant had formed an attorney-client relationship. Moreover, her testimony clearly established that appellant had extensively discussed with her the matters which later developed into court-martial charges. Although the military judge found as a matter of fact "that there was no communication by the accused to Captain Robb about any matter of any substance whatsover concerning these charges," the record of Captain Robb's testimony does not support this finding as a matter of law. Captain Robb at one point minimized *her* input in these discussions by characterizing it as "more consolation than advice." However, as the military judge early recognized, the critical focus is not on what the lawyer said to the client but rather on what the client said to the lawyer. Second, the evidence unequivocally established that, after this attorney-client relationship had been established and then terminated, Captain Robb joined the staff of the office then prosecuting appellant. Indeed, she was assigned associate responsibilities with the trial counsel who actually prosecuted appellant.

Thereupon, the burden shifted to the Government to show affirmatively that no communication whatsoever took place between Captain Robb and the remainder of the prosecution staff concerning any aspect of appellant's court-martial.

During her testimony, Captain Robb was not asked one question by either side concerning her activities once she became a prosecutor. Instead, trial counsel relied entirely on his assertion of fact in his trial brief – and the military judge apparently also did so when entering his findings of fact. If the Government's response to the defense motion to recuse be construed to include an offer of proof, an offer of proof is not itself evidence. Thus, no evidentiary basis existed for the military judge's statement that "in this case no such discussions have taken place between Captain Robb and any of the prosecutors assigned to this office pertaining to this case." Indeed, the judge himself seems to have been aware that the record was deficient in evidence, for he added, "I'm reading between the lines."

Immediately thereafter, however, both the civilian defense counsel and the military defense counsel indicated their agreement with the judge's assertion that Captain Robb had not discussed the case with other prosecutors. Although the actions of the defense counsel did not constitute formal entry into a stipulation,[3] we believe that they were in the nature of an informal agreement to stipulate on the part of the defense. We find nothing in the record which would indicate that "doubt exists as to the accused's understanding of what is involved." Para. 54*f*(1), Manual for Courts-Martial, United States, 1969 (Revised edition).

Under these circumstances, we consider it unnecessary to order a hearing in accordance with *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), wherein Captain Robb could be interrogated as to whether she had discussed appellant's disclosures with some other prosecutor. Instead, we shall proceed now on the premise that no such discussions occurred. On that premise, the Government's burden has been met, so there was no reason to recuse all the other trial counsel in the office to which Captain Robb had been assigned.

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[3] *See* para. 54*f*, Manual for Courts-Martial, United States, 1969 (Revised edition), which was in effect at the time of trial; R.C.M. 811, Manual for Courts-Martial, United States, 1984.

Of course, we do not commend the procedure followed in this case. In the first place, trial counsel should have specifically asked Captain Robb whether she had discussed with anyone else any comments made to her by appellant. Secondly, the military judge should have noticed the omission and either suggested that trial counsel ask further questions of the witness or else propounded such questions himself. Thirdly, if the judge chose to "read between the lines" – which itself is not the wisest course of action – he should have asked counsel and the accused to stipulate expressly that his "reading" was accurate. *Cf.* R.C.M. 811, Manual for Courts-Martial, United States, 1984.

The way in which this matter was handled at trial is akin to the loose procedure which led to a recent admonition that trial judges should not let the litigants lapse into a procedure whereby

> the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called. The other party then counters with his/her own argument and offers of proof (usually countering with another offer of proof that so and so really will NOT testify as indicated, or someone else would testify that those facts set out in the first offer of proof are not quite accurate). . . . The successful judge channels this mess into a format where it can be dealt with, and where his/her findings can be upheld on appeal. . . . Do not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save you time and grief and provide a solid record.[4]

IV

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

Judge SULLIVAN did not participate.

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[4] *See* 18 *The Dicta* 77 (August 10, 1986). This is a publication of the U.S. Air Force Trial Judiciary for the information of its trial judges.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 52436/AR
CMR Dkt. No. 443722

UNITED STATES, APPELLEE

v.

ARTHUR D. STUBBS (587-34-9390),

APPELLANT

ORDER

On consideration of the granted issue (21 M.J. 275) in light of *United States* v. *Stubbs*, 23 M.J. 188 (C.M.A. 1987), it is, by the Court, this 6th day of May, 1987,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (SULLIVAN)
Appellate Government Counsel (SWANN)

* Judge SULLIVAN did not participate.

APPENDIX C

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
McKAY, WATKINS, AND LYMBURNER
Appellate Military Judges

CM 443721

UNITED STATES, APPELLEE

v.

CAPTAIN ARTHUR D. STUBBS (587-34-9390),
UNITED STATES ARMY, APPELLANT

Convened by XVIII Airborne Corps and Fort Bragg;
Action by Fort Hood
P.C. Wold, Military Judge

Captain Michael D. Graham, JAGC, argued the cause for appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, and Captain Harry L. Williams, Jr., JAGC.

Captain Robert L. Swann, JAGC, argued the cause for appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Major Patrick M. Flachs, JAGC.

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25 April 1985

MEMORANDUM OPINION

WATKINS, Judge:

The appellant was tried by a general court-martial composed of officer members at Fort Bragg, North Carolina. Arraigned on multiple charges and specifications drawn under Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934 (1982), respectively, the trial judge granted a defense-initiated motion to sever with the result that certain of the charges and specifications were tried separately.[1] In the instant court-martial, the appellant, in accordance with his pleas, was convicted of larceny of percodan tablets (six specifications) in violation of Article 121, UCMJ, 10 U.S.C. § 921 (1982). The adjudged and approved sentence extended to dismissal from the service, confinement at hard labor for six months, and forfeiture of all pay and allowances.

The principal appellate issue in this case relates to the denial of a defense motion to recuse the Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg from participating in the prosecution of these criminal allegations. We find that the recusal motion was properly denied and affirm.

At a pretrial motions hearing, it was established that, prior to the time the charges were preferred, the appellant sought legal advice from and established an attorney-client relationship with Captain J. Robb, a Legal Assistance Officer in the Corps SJA Office, and that thereafter, and prior to this court-martial, Captain Robb was rotated to the Military Justice Section of that office.

The duration of the aforementioned attorney-client relationship was from December 1981 until April 1982, at which time it became clear that the case against the appellant would be disposed of in criminal, rather than administrative, channels. Captain Robb's intraoffice reassignment to the Military Justice Section as a Trial Counsel took place several months later, the effective date being 2 August 1982.[2] In her new position, Captain Robb was to handle cases from the Medical

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[1] CM 443722

[2] There is nothing in the record of trial to suggest that the change in duty assignment constituted anything other than a routine rotation of one or more junior officers, apparently predicated upon general operational and training considerations.

Detachment and the Airborne Board and to assist Captain M. Hoadley with cases from Headquarters Command and the 525th Military Intelligence Group.

This case was brought to trial during the October-November 1982 time frame. The appellant was represented by Captain R. Mosakowski, the Detailed Defense Counsel, and by Mr. W. Byrd, Civilian Defense Counsel. The Trial Counsel was Captain Hoadley. Captain Robb did not perform in a representational capacity at the court-martial but did appear as a witness at a motions hearing on the issue of whether her change of duty assignment had in any manner disadvantaged the appellant. *Inter alia,* she testified that she "never addressed [the appellant] in a legal capacity regarding the charges," that she "simply did not have the knowledge to legally advise him as to the substance of [these] charges," that she offered him "more consolation than advice," and that the essence of the appellant's disclosure to her was to the effect that "the charges were completely unfounded and [that] he was totally innocent." More importantly, it was established that Captain Hoadley had full prosecutorial responsibility for this case beginning on 23 July 1982; that Captain Robb disclosed to no one information provided her by the appellant; and that she was not involved with the prosecution of the criminal charges against the appellant. The civilian defense counsel affirmatively indicated that he did not disagree with these representations of fact. Moreover, all of the parties to the trial agreed that Captain Robb had not discussed this case with any of the prosecutors in the Military Justice Section. Under these facts and circumstances, we conclude that the defense motion to recuse the Army legal office at Headquarters, XVIII Airborne Corps and Fort Bragg was properly denied. *See United States v. Reynolds,* 19 M.J. 529 (ACMR 1984); *United States v. Caggiano,* 660 F.2d 184 (6th Cir. 1981), *cert. denied,* 454 U.S. 1149 (1982); *Young v. State,* 465 A.2d 1149 (Md. 1983); *see also United States v. Carreiro,* 14 M.J. 954 (ACMR 1982), *rev'd in part on other grounds,* 15 M.J. 403 (CMA 1983); *accord State v. Fitzpatrick,* 36 Crim. L. Rep. (BNA) (Fla. Sup. Ct. 28 Feb. 1985) (holding that the mere fact that a criminal defendant discussed his case in con-

fidence with an attorney who subsequently joined the staff of the state attorney's office that was to prosecute the defendant did not require the disqualification of the entire state attorney's office). Finally, we conclude that the accused was effectively represented at trial and that he suffered no prejudice as a result of the antecedent change in duty assignment of Captain Robb, the former Legal Assistance Officer.

The remaining assignments of error, to include those raised personally by appellant, are without merit.

The findings of guilty and the sentence are affirmed.

McKAY, Senior Judge, concurring:

I concur with the lead opinion. I feel, however, that the appellant's second assignment of error warrants a few comments. In that assignment Captain Stubbs raises an issue going to the effect of the military judge granting a defense motion to sever some of the many charges originally referred for trial. Specifically, the appellant claims that error occurred when three sessions held under Article 39(a), Uniform Code of Military Justice (UCMJ), by a court-martial convened under Court-Martial Convening Order (CMCO) 96, were treated as part of the proceedings of this trial. There is no merit to this contention.

The facts relevant to this issue are briefly as follows. Originally numerous charges were referred to a general court-martial convened by CMCO 96. Pretrial sessions under Article 39(a), were held on 7, 19 and 20 October 1982. During one of the sessions the military judge granted a defense motion for severance of charges involving the larceny, wrongful transfer, and possession of a narcotic drug, Percodan. The appellant was promptly tried on the remaining charges. The severed charges were "re-referred" by the convening authority for trial by a general court-martial "convened" by CMCO 103. These are the subject charges of this case. At an Article 39(a) session convened on 19 November 1982, the military judge considered the proceedings at the earlier Article 39(a) sessions as part of this case and did not readvise the appellant

of his rights to counsel or his choice of forum.[1] *See United States v. Donohew,* 39 C.M.R. 149 (CMA 1969); *United States v. Parker,* 5 M.J. 489 (CMA 1978).

While there was no visible legal basis for the severance of charges in this case, the appellant knowingly moved and argued for the severance apparently believing it would be to his advantage. Whether this is the case in a particular case probably depends upon ones point of view when the matter is considered. I believe, however, that authority to grant a severance motion is within the discretionary power of the military judge. *See United States v. Brice,* 19 M.J. 170, 173 (CMA 1985); *United States v. Getz,* 49 C.M.R. 83 (NCMR 1974). *See also* R.C.M. 906(b)(10), a new provision, not controlling in this case, added to the Manual for Courts-Martial in 1984. Moving on to consideration of the legal effect of the severance, I agree with the military judge that those proceedings that occurred prior to the severance were a part of this trial. Despite the labeling of the convening authority's actions as a "referral", I conclude there was merely a substitution of new court members by the convening authority and that there was no withdrawal and re-referral of charges in this case. *See United States v. Scantland,* 14 M.J. 531 (ACMR 1982), *pet. denied,* 14 M.J. 449. Accordingly, the inclusion in this record of the Article 39(a) sessions on 7, 19 and 20 October, convened pursuant to CMCO 96, was not error as the appellant asserts because those sessions were a part of this case.

LYMBURNER, Judge, concurring:

I concur. However, the opinion thus far does not provide sufficient facts to understand and resolve appellant's assigned error regarding the "separateness and completeness" of the trial proceedings and record. Also, this case well illustrates the requirement for additional guidance in how to

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[1] The military judge noted this advice had been given at "previous proceedings". There was no request for further advice or objection to its absence. The appellant and government were represented by the same counsel who had previously appeared.

implement R.C.M. 906(b)(10), MCM, 1984, a new rule of court covering the severance of offenses at trial by the military judge.

This Court now affirms the findings and sentence in this case. This Court also affirmed the findings and sentence resulting from another trial by general court-martial of appellant.[1] Each conviction includes a number of those charges and specifications which the convening authority has referred for trial by the general court-martial convened by Court-Martial Convening Order (CMCO) Number 96, Headquarters, XVIII Airborne Corps and Fort Bragg, dated 30 September 1982. Trial started with three Article 39(a), UCMJ, sessions, the transcript of which consists of 196 pages; during these proceedings the military judge arraigned appellant on all charges and specifications. The appellant elected to be tried by court members and to be represented by detailed military counsel and his civilian counsel. The military judge ruled on a number of defense motions, to include granting a defense motion to "sever some of the charges and specifications for separate trials." The proceedings and record of these three Article 39(a) sessions are a vital yet "common" part of the record for *each* trial by general court-martial, and this is the basis for appellant's second assignment of error.

The proceedings and records in each case do not violate the provisions and intent of Article 54(a), UCMJ (each general court-martial shall keep a separate record of the proceedings of each case brought before it) and paragraph 53*b*, MCM, 1969 (Rev.) (in each case, the proceedings and the record, thereof, must be completed without reference to any other case). The procedural guidance in paragraphs 69*d*, (motion to sever – that is, a separate trial for one of two or more ac-

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[1] This case involves drug-related offenses. The appellant was convicted, pursuant to his pleas, of larceny of drugs (six specifications); the military judge dismissed the other twelve, drug-related, and multiplicious specifications. In United States v. Stubbs, CM 443722 (ACMR 28 Mar. 1985) (unpub.), appellant was convicted contrary to his pleas of charges of larceny of monies (two specifications) and violations of a lawful regulation – i.e., misuse of government facilities (three specifications).

cused) and 67*f*, (effect of rulings on motion), MCM, 1969 (Rev.) are suficiently analogous to support what occurred in the trials of appellant. For example, in those cases where two or more accused are subject to a "common arraignment" and the trial for each accused thereafter proceeds separately and in series, it is military practice that the proceedings and record, thereof, up to and including arraignment, are part of each accused's trial. Conceptually and logically, the same can be true for handling in series multiple charges and specifications against one accused. In this case the defense had moved for severance and separate trials of the offenses; the military judge granted the motion prior to assembly of the court members or introduction of evidence on the merits; the convening authority "re-referred the severed charges" for trial by general court-martial; the appellant had requested and received trial by court members, and the convening authority detailed different panels for each trial; the military judge authenticated in each case the record of trial including the 196 page transcript of the three Article 39(a) sessions; and all parties to the trial proceedings accepted the proceedings and and record as "separate and complete" in each case.

Implicit, but not discussed, in the second assignment of error is the analysis that trial proceedings on the charges and specifications in this case were "terminated" on 20 October 1982 when the military judge granted the severance motion, and the trial started anew on 19 November 1982 after the convening authority had "re-referred" the charges and specifications and detailed new court members on CMCO Number 103, Headquarters, XVIII Airborne Corps and Fort Bragg, dated 10 November 1982.[2] This analysis raises a possible double jeopardy issue, if the military judge had "no visible legal basis for the severance of charges" and the appellant had been placed in jeopardy due to his arraignment and the introduction of substantial evidence relevant to guilt

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[2] The initial promulgating order states that the appellant was arraigned and tried on CMCO Number 103.

or innocence of the charges.[3] *See* an excellent analysis on this issue in *United States v. Browers*, Misc. Docket No. 1985/1, slip op. at 17 (ACMR 10 Apr. 1985).

In this case appellant was not placed in jeopardy on the charges and specifications prior to the severance action by the military judge on 20 October 1983; the trial proceedings were initiated on 7 October 1982, "interrupted" on 20 October 1982 when the military judge granted the defense motion to sever, and resumed on 19 November 1982 after the convening authority had "re-referred" the charges and detailed new court members. This analysis is supported by the facts and intent of the parties in this case, the *Manual* provisions cited above, and *United States v. Scantland*, 14 M.J. 531 (ACMR), *pet. denied*, 14 M.J. 449 (CMA 1982) (convening authority's action in directing that charges be "re-referred" constituted substitution of members and not withdrawal of charges from court-martial to which charges and specifications were originally referred).

Clearly the military judge had authority to grant defense relief from a perceived prejudicial misjoinder of multiple charges and specifications (24 in number), and that the facts in the record and opinions of this Court support the defense request and military judge's action. Military motion practice before courts-martial does not preclude a defense motion to sever certain offenses in the interests of justice, *see* paragraph 69, (MCM, 1969 (Rev.), and in several opinions this Court has assumed that the trial judge had such authority.

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[3] The other concurring judge states that there was "no visible legal basis" for granting the motion. The record contains no findings by the military judge on his basis for granting the motion, and there was no requirement or request that he make such findings. There is no clearly articulated standard in prior case law or in the MCM, 1969 (Rev.) against which the military judge's "discretion" may be measured, other than the general rules that the proponent must support his motion for relief by a preponderence of the evidence and that rulings by the judges are evaluated on "abuse of discretion." In United States v. Brice, 19 M.J. 170, 173 (J. Fletcher, concurring), the Court states that "all matters concerning the trial are within the discretion of the trial judge", but the opinion was prefaced by the assumption the defendant has been placed in jeopardy. When the military judge in effect "overruled" the convening authority's referral of all charges for a single trial, the appellant had not been placed in jeopardy.

See United States v. Carter, 4 M.J. 758 (ACMR 1977), *pet. denied*, 5 M.J. 155 (CMA 1978); *United States v. Partridge*, 41 C.M.R. 548 (ABR 1969), *pet. denied*, 41 C.M.R. 403 (CMA 1970); *United States v. Awrey*, 22 C.M.R. 396 (ABR 1956). The appellant at trial accepted the burden to support by a preponderence of the evidence his motion for appropriate relief. All parties to the trial were well aware of applicable principles of military practice, to include (1) that at the discretion of the convening authority, all charges against the accused ordinarily should be tried at a single trial,[4] (2) that the Federal Rules of Criminal Procedures relating to separate trials for unrelated offenses do not apply to courts-martial,[5] and (3) that ordinarily a defense motion to require the prosecution to elect upon which charges or specfications it will proceed, will not be granted.[6] The military judge explored in painstaking detail and caution the basis for the defense motion and the positions of the parties, and I do not believe he abused his discretion in granting the motion.[7]

The MCM, 1984 attempts to expand, or perhaps clarify, military motion practice for severance of offenses,[8] but insufficient procedural guidance is provided how to handle those charges severed by the military judge. As pointed out by C.J. Clausen, in *United States v. Carter, supra* at 760, defense

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[4] Paragraph 33*h*, MCM, 1969 (Rev.).

[5] United States v. Carter, 4 M.J. 758 (ACMR 1977), *pet. denied*, 5 M.J. 155 (CMA 1978).

[6] Paragraph 69*f*, MCM, 1969 (Rev.).

[7] This determination is based upon the cited cases and procedural provisions in the MCM, 1969 (Rev) and earlier Manuals. There is no need to opine whether the record supports granting the motion under the apparently higher standard in R.C.M. 906(b)(10), MCM, 1984, effective 1 August 1984 (severance of offenses, but only to prevent manifest injustice).

[8] Specifically, R.C.M. 906(b)(10) provides that a military judge may grant a motion to sever offenses, "but only to prevent manifest injustice". This standard is apparently based upon language in United States v. Carter, 4 M.J. 758, 760 (ACMR 1977), wherein the Court rejected the appellant's contention that the military judge should have *sua sponte* severed multiple charges. The Court opined that in the absence of a defense motion or manifest "miscarriage of justice", the military judge had no *sua sponte* duty to sever the charges.

motions to sever specifications into separate trials would create "significant administrative difficulties [for] judges, counsel, and court members" and the subjecting of an accused "to multiple trials and the attendant role of multiple punishments". In this case, the military judge was responsive and correct in handling the trial proceedings and the defense motions; the convening authority's actions were authorized; and the appellant received a fair trial. Whatever error may have been committed in the conduct of the proceedings or preparation of the trial record was harmless within the meaning of Article 59(a), UCMJ. There is no basis for this Court to grant now appellant's request to set aside the findings and sentence and authorize a rehearing.

FOR THE COURT:

/s/ ABRAHAM NEMROW
Abraham Nemrow
Acting Clerk of Court

APPENDIX D

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
McKAY, WATKINS, and LYMBURNER
Appellate Military Judges

CM 443722

UNITED STATES, APPELLEE

v.

CAPTAIN ARTHUR D. STUBBS (587-34-9390),
UNITED STATES ARMY, APPELLANT

Convened by XVIII Airborne Corps and Fort Bragg;
Action by Fort Hood

P.C. Wold, Military Judge

Captain Michael D. Graham, JAGC, argued the cause for appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, and Captain Harry L. Williams, Jr., JAGC.

Captain Robert L. Swann, JAGC, argued the cause for appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Major Patrick M. Flachs, JAGC.

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28 March 1985

MEMORANDUM OPINION

WATKINS, Judge:

The appellant was tried by a general court-martial composed of officer members at Fort Bragg, North Carolina. Arraigned on multiple charges and specifications drawn under Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934 (1982), respectively, the trial judge granted a severance motion with the result that certain of the charges and specifications were tried separately.[1] In the instant court-martial, the appellant contrary to his pleas, was convicted of larceny (two specifications) in violation of Article 121, UCMJ, 10 U.S.C. § 921 (1982) and violation of a lawful general regulation, i.e., misuse of Government facilities (three specifications) in violation of Article 92, UCMJ, 10 U.S.C. § 892 (1982). The adjudged and approved sentence extended to dismissal from the service and forfeiture of all pay and allowances.

The principal appellate issue in this case relates to the denial of a defense motion to recuse the Office of the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg from participating in the prosecution of three criminal allegations. We find that the recusal motion was properly denied and affirm.

At a pretrial motions hearing, it was established that, prior to the time the charges were preferred, the appellant sought legal advice from and established an attorney-client relationship with Captain J. Robb, a Legal Assistant Officer in the Corps SJA Office, and that thereafter, and prior to this court-martial, Captain Robb was rotated to the Military Justice Section of that office.

The duration of the aforementioned attorney-client relationship was from December 1981 until April 1982, at which time it became clear tht the case against the appellant would be disposed of in criminal, rather than administrative channels. Captain Robb's intraoffice reassignment to the Military Justice Section as a Trial Counsel took place several months later, the effective date being 2 August 1982[2]. In her new

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[1] CM 443721

[2] There is nothing in the record of trial to suggest that the change in duty assignment constituted anything other than a routine rotation of one or

position, Captain Robb was to handle cases from the Medical Detachment and the Airborne Board and to assist Captain M. Hoadley with cases from Headquarters Command and the 525th Military Intelligence Group.

This case was brought to trial during the October-November 1982 time frame. The appellant was represented by Captain R. Mosakowski, the Detailed Defense Counsel, and by Mr. W. Byrd, Civilian Defense Counsel. The Trial Counsel was Captain Hoadley. Captain Robb did not perform in a representational capacity at the court-martial but did appear as a witness at a motions hearing on the issue of whether her change of duty assignment had in any manner disadvantaged the appellant. *Inter alia*, she testified that she "never addressed [the appellant] in a legal capacity regarding the charges," that she "simply did not have the knowledge to legally advise him as to the substance of [these] charges," that she offered him "more consolation than advice," and that the essence of the appellant's disclosure to her was to the effect that "the charges were completely unfounded and [that] he was totally innocent." More importantly, it was established that Captain Hoadley had full prosecutorial responsibility for this case beginning on 23 July 1982, that Captain Robb disclosed to no one information provided her by the appellant, and that she was not involved with the prosecution of the criminal charges against the appellant. The civilian defense counsel affirmatively indicated that he did not disagree with these representations of fact. Moreover, all of the parties to the trial agreed that Captain Robb had not discussed this case with any of the prosecutors in the Military Justice Section. Under these facts and circumstances, we conclude that the defense motion to recuse the Army legal office at Headquarters, XVIII Airborne Corps and Fort Bragg was properly denied. *See United States v. Reynolds*, 19 M.J. 529 (ACMR 1984); *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 454 U.S. 1149 (1982); *Young v. State*,

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more junior officers, apparently predicated upon general operational and training considerations.

465 A.2d 1149 (Md. 1983); *see also United States v. Carreiro*, 14 M.J. 954 (ACMR 1982), *rev'd in part on other grounds*, 15 M.J. 403 (CMA 1983). Finally, we conclude that the accused was effectively represented at trial and that he suffered no prejudice as a result of the antecedent change in duty assignment of Captain Robb, the former Legal Assistance Officer.

The remaining assignments of error, to include those raised personally by appellant, are without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge McKAY and Judge LYMBURNER concur.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX E

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 52435/AR
CMR Dkt. No. 443721

UNITED STATES, APPELLEE

v.

ARTHUR D. STUBBS (587-34-9390),
APPELLANT

ORDER DENYING PETITION FOR RECONSIDERATION

On consideration of the appellant's petition for reconsideration of the Court's decision, 23 M.J. 188 (C.M.A. 1987), it is by the Court, this 5th day of May, 1987

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (MONTGOMERY)
Appellate Government Counsel (WILLIAMS)

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